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January 5, 1998

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Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
Room 222, 1919 M Street, NW
Washington, DC 20554

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JAN 5 - 1998

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Re: MM Docket No. 97-97
RM-9047

Dear Ms. Salas:

Transmitted herewith, on behalf of Mt. Juliet Broadcasting, Inc., permittee of WNPL(FM), Belle Meade, Tennessee, is an original and four copies of its Opposition to Application for Review filed by The Cromwell Group, Inc. in the above-referenced proceeding.

Should there be any questions, please contact the undersigned.

Very truly yours,



Thomas J. Hutton
Counsel for
Mt. Juliet Broadcasting, Inc.

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Enclosures

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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JAN 5 - 1998

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In re)
)
Amendment of Section 73.202(b)) MM Docket No. 97-97
Table of Allotments) RM-9047
FM Broadcast Stations)
(Mt. Juliet and Belle Meade,)
Tennessee))

To: The Commission

OPPOSITION TO APPLICATION FOR REVIEW

Mt. Juliet Broadcasting, Inc. ("MJB"), by its attorneys and pursuant to Section 1.115(d) of the Commission's Rules, hereby opposes the December 19, 1997 "Application for Review" filed by The Cromwell Group, Inc. ("Cromwell"). In support, the following is shown:

1. Background.

MJB is the permittee of WNPL(FM), Belle Meade (formerly Mt. Juliet), Tennessee. WNPL's community of license was changed from Mt. Juliet to Belle Meade after WNPL voluntarily discontinued operation due to a complaint of interference to certain airspace navigational equipment used by the Federal Aviation Administration ("FAA"). After analyzing the situation, the Mass Media Bureau determined that WNPL could not operate on Channel 294A at any site providing city-grade coverage of Mt. Juliet without creating interference to the FAA's navigational equipment. The Bureau

accordingly granted MJB's request to change WNPL's community of license from Mt. Juliet to Belle Meade and granted MJB's application to use a new transmitter site. In its Application for Review, Cromwell contorts applicable case law in an attempt to justify a completely unprecedented outcome -- deletion of the Mt. Juliet allotment and cancellation of MJB's construction permit for WNPL. MJB demonstrates herein that neither relevant Commission decisions nor applicable policy considerations support such a perverse outcome.

Cromwell's Application for Review seeks to overturn a Memorandum Opinion and Order released by the Mass Media Bureau on October 31, 1997.¹ That MO&O denied a Petition for Reconsideration filed by Cromwell on August 12, 1997. Cromwell had sought reconsideration of a Report and Order that reallocated FM Channel 294A from Mt. Juliet to Belle Meade, Tennessee and modified MJB's construction permit for WNPL(FM) to specify Belle Meade as the community of license.²

Cromwell did not file any comments in the Mt. Juliet/Belle Meade rulemaking until it sought to file untimely comments after the adoption of the Report and Order. In the Report and Order, the Bureau found that the proposed allotment of Channel 294A to Belle Meade satisfied the Commission's criteria for FM reallocations.³ In

¹ Memorandum Opinion and Order, DA 97-2297, FCC 1997 LEXIS 5908 (Mass Media Bur., released Oct. 31, 1997) (the "MO&O").

² Report and Order, 12 FCC Rcd 10481 (Mass Media Bur. 1997) (the "Report and Order").

³ See Modification of FM and TV Authorizations to Specify a New Community of License, 4 FCC Rcd 4870 (1989), recon. granted in part, 5 FCC Rcd 7094 (1990) ("Community of License").

particular, the Bureau concluded that there was no possible transmitter location for WNPL that would provide city-grade coverage of Mt. Juliet without causing interference to airspace navigational facilities operated by the FAA.⁴ The Bureau therefore decided that the public interest would be better served by modifying the WNPL construction permit to specify Belle Meade as the community of license. In doing so, the Bureau noted that WNPL had voluntarily terminated operation at its original site on November 7, 1996 in response to a complaint of interference to air navigation and that, pursuant to a formal agreement with the FAA, MJB had agreed to pay the costs of changing the frequencies of two FAA air navigational devices.⁵

Cromwell then filed its Petition for Reconsideration of the Report and Order. In that Petition, Cromwell argued that Commission precedent required that the allocation of Channel 294A to Mt. Juliet be deleted rather than reallocated to Belle Meade. Cromwell also argued that MJB's predecessor had acknowledged the potential for interference to FAA facilities in an amendment to its application in which it indicated a willingness to accept a condition requiring that the station take such corrective action as may be needed to remedy any such interference.

⁴ The FAA had previously reached the same conclusion. MJB submitted a letter dated May 12, 1997 from the FAA's Program Director for Spectrum Policy and Management, stating that "none of [the potential] sites could operate without causing unacceptable predicted EMI within one or more of the frequency protected service volumes of the instrument landing systems" at the Nashville, Tennessee and the Smyrna, Tennessee airports. See "Comments of Mt. Juliet Broadcasting, Inc." dated May 12, 1997.

⁵ The FAA has made the necessary frequency changes.

In the MO&O, the Bureau distinguished the cases that Cromwell had cited as "controlling and dispositive authority" requiring the deletion of the allotment of Channel 294A at Mt. Juliet rather than reallocation of the channel at Belle Meade. The Bureau pointed out that the cases cited by Cromwell involved allotments with no outstanding construction permit and therefore no expectation that service to the public could be provided on the channel in light of the technical problems shown. None of the cases cited by Cromwell involved an outstanding construction permit such as the WNPL permit. Further, none of the cases involved a fully-constructed station ready to be licensed, as WNPL was. In the case of WNPL, it was clear that service could be initiated through a modification of the permit, in accordance with the Commission's Community of License decision. The Bureau also rejected Cromwell's argument that modification of the permit was inconsistent with the proposed condition requiring the permittee of WNPL to take corrective action to eliminate any interference to FAA navigational facilities. The Bureau concluded that the modification of the permit as proposed by MJB was in fact consistent with this condition because the modification (combined with MJB's undertaking to pay for modification of the FAA's navigational equipment) would eliminate the interference problem. Accordingly, the Bureau reissued the WNPL construction permit to specify Belle Meade as the community of license, to specify the transmitter site proposed by MJB and to specify an expiration date of March 11, 1998.

2. Cromwell Has Not Demonstrated Standing.

Section 1.115(a) allows parties that are aggrieved by any action taken by delegated authority to file an application for review of such action. Cromwell has not demonstrated in its Application for Review that it is an "aggrieved" party, *i.e.*, that its interests were adversely affected by the Bureau's decision. The Application for Review therefore is subject to dismissal.⁶

3. Cromwell's Interpretation of Case Law Is Erroneous.

Cromwell's Application for Review relies entirely upon the same line of Commission decisions that were distinguished in the MO&O as inapposite to this case. Cromwell does not cite any case in which the Commission deleted an allotment after a construction permit had been issued, as Cromwell requests in this case.

Cromwell's interpretation of applicable case law is simply wrong. In the Sanibel⁷ decision cited by MJB in its September 11, 1997 "Opposition to Petition for Reconsideration," the Mass Media Bureau reallocated Channel 253A from Sanibel to San Carlos Park, Florida under virtually identical circumstances. In the Sanibel case, the permittee ("Ruth") had attempted to construct and operate a new FM station at Sanibel since September 1988, but was never able to secure a usable transmitter site that would

⁶ See Toledo Broadcasting, Inc., 10 FCC Rcd 8242 (1995)(In dismissing a petition based on a failure to demonstrate standing, the Commission states: "The Commission is not obligated to presume . . . facts that a petitioner is required to allege").

⁷ In re Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations (Sanibel and San Carlos Park, Florida), 10 FCC Rcd 7215 (Mass Media Bur. 1995) ("Sanibel").

provide city-grade coverage of Sanibel. Various federal, state and local authorities objected to Ruth's proposed sites for a number of reasons, including preservation of sensitive wetlands, protection of a bald eagle's nest, short-spacing and other technical concerns. The Bureau approved the reallocation and the modification of Ruth's permit because no site appeared to be available for the construction permit at Sanibel and the reallocation of Channel 253A to San Carlos Park would provide that community with its first local transmission service.

The present case is essentially the same as the Sanibel case. MJB has shown, and Cromwell concedes, that Channel 294A cannot be used at Mt. Juliet due to interference with FAA navigational equipment. Accordingly, the only issue is whether the public interest would be better served by reallocating Channel 294A to Belle Meade, thereby enabling MJB to commence service on the new station immediately, or whether the allotment should be deleted and later resurrected as a new channel at a different community (very likely Belle Meade) and auctioned off, as Cromwell suggests. In both the Sanibel case and in this case, the Bureau concluded that the public interest would be served best by allowing the permittee to proceed with re-construction at a new transmitter site with a new community of license. Cromwell's suggested approach would delay the commencement of service by a year or more without providing any offsetting public interest benefits.

Cromwell's primary argument in favor of deleting the Channel 294A allotment is a policy argument that allowing a non-buildable allotment to be modified will encourage trickery by insincere applicants that know that a proposed station cannot be

built. The facts of this case negate this argument. It is undisputed that the permittee of WNPL constructed the station as a Mt. Juliet station and then stopped operating the station due to interference with the FAA's navigational equipment. In other words, this is not a case where the permittee had no intention of building the authorized facilities or intended to build the station only as a station serving a different community than the allotted community of Mt. Juliet. Moreover, Cromwell's argument would dictate that the Commission never allow a permittee to change the community of license for a construction permit. That is not and never has been the law.⁸

Cromwell also argues that MJB deserves to have the allotment deleted because its predecessor agreed to accept a condition (one that was not actually imposed) that it would take all steps necessary to eliminate interference with the FAA's navigational equipment. However, the Bureau correctly pointed out that the change in WNPL's community of license, combined with MJB's payment to the FAA to modify its equipment, is fully consistent with the proposed condition. Cromwell utterly fails to demonstrate otherwise.

Cromwell concedes that deleting the Channel 294A allotment would delay service on the channel, but argues that this delay is negated by the Commission's proposed auction procedure, which will ensure that a construction permit which can be built will be issued once the channel is reallocated and auctioned off. See Application for Review

⁸ See, e.g., In re Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations (Jupiter and Hobe Sound, Florida), 11 FCC Rcd 12707 (Mass Media Bur. 1996); In re Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations (Winslow and Kachina, Arizona), 6 FCC Rcd 5117 (Mass Media Bur. 1991).

at 9. Again, Cromwell's argument overlooks the facts of this case. WNPL was built in accordance with its original construction permit. This is not a case of a permittee that failed to build a proposed station. The station was built, but was taken off the air due to the FAA interference problem. MJB has acted in good faith to solve the problem expeditiously, by changing the community of license and transmitter site and by entering into an agreement with the FAA. Cromwell's proposed "solution" not only is inconsistent with relevant precedent, but also would harm the public interest by delaying the resumption of service on the station in a manner that resolves the FAA interference problem.

4. Conclusion.

Cromwell's Application for Review contorts applicable case law and policy arguments in an attempt to justify a perverse outcome. The Bureau's actions in this case follow relevant case law and are supported by appropriate policy justifications. Cromwell does not contest the central determination in this case, which is that WNPL cannot be operated at Mt. Juliet without causing harmful interference to the FAA's navigational equipment. Having made that determination, the Bureau appropriately concluded that WNPL's channel should be reallocated and that MJB's construction

permit should be modified to specify a new community of license and a new transmitter site. Cromwell's Application for Review provides no basis for overturning that decision.

Respectfully submitted,

MT. JULIET BROADCASTING, INC.

By Thomas J. Hutton
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January 5, 1998

CERTIFICATE OF SERVICE

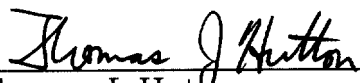
Thomas J. Hutton hereby certifies that he caused the foregoing "Opposition to Application for Review" to be delivered by hand or sent by first-class mail, postage prepaid, this 5th day of January 1998 to the following:

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